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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 291

WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN Cromwell, et al., etc., Appellants

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

FINDINGS OF FACT AND OPINION BELOW

The findings of fact and the opinion of the Court of Claims (R. 7–12) are reported in 60 C. Cls. 255.

JURISDICTION

The judgment below was entered January 26, 1925. (R. 13.) An application for appeal was filed February 5, 1925, and allowed February 9, 1925 (R. 13), under authority of Section 242 of the Judicial Code, which was then in force.

STATEMENT OF THE CASE

Appellants sue to recover damages in the sum of $30,000 for the breach of an alleged express warranty of quality of certain surplus airplane linen sold them by the Government. (R. 1–3.)

The Court of Claims found that in January, 1920, the Materials Disposal and Salvage Division of the Office of the Director of Air Service of the Army was in possession of a considerable quantity of surplus airplane linen which it desired to sell. (Finding II, R. 8.) It advertised this linen for sale on January 15, 1920, in two items of 68,400 yards and 100,000 yards, in various publications in New York City and elsewhere, and invited bids. (Finding IV, R. 8.) Other surplus materials were also covered by the same advertisement.

This advertisement described the linen as "Grade A," and stated "that the materials would be sold '*as is*' at point of storage; *that inspection is invited* and that 'specifications and quantities on hand are based upon the best information available, *but no guaranty on the part of the Government is given.*'" (Italics ours.)

The advertisement further provided "that bids might be made for 1,000 yards or multiples thereof, or for any entire lot; that bids would be received until three o'clock a. m. (sic.), February 2, 1920; that the bidders would be notified on or before February 5 of the yardage awarded, upon receipt of which notification they would be required to for-

ward a check or draft for 10 per cent of the purchase price;" and that " all materials (were) to be removed and paid for within 30 days." (Finding IV, R. 8.)

The above advertisement came to the attention of one McDowell, a representative of the appellants, who are members of a partnership " engaged in the business of handling fabrics " (R. 7, 11, 12), and on their behalf he submitted the following bid (Finding V, R. 9):

NEW YORK, *Feb. 2d, 1920.*

MATERIALS DISPOSAL & SALVAGE DIVISION,
OFFICE OF THE DIRECTOR OF AIR SERVICE,
Building B, Sixth and B Sts. N. W.,
Washington, D. C.

GENTLEMEN: I herewith submit my firm offer for approximately 168,400 yards of 38-inch grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105. Minimum weight, 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93 cents per yard, f. o. b. cars at present location. *Said linen as per sample submitted; goods to be firsts.*

This offer is for immediate acceptance on usual Government terms.

Yours very truly,

E. I. McDOWELL.

(Italics ours.)

It will be noted that the above bid contains the clause that the linen should be " as per sample sub-

mitted." Attention is invited in this connection to Findings III and V of the Court of Claims. (R. 8, 9.) As appellants do not rely for recovery upon this clause of their bid, it would only tend to becloud the real issue in this case to say more at this point than that the findings do not show that "samples" of the linen were ever exhibited to appellants by any authorized agent of the Government; that appellants do not contend that the present sale was one by sample; and that they do not deny that the above bid, which was the only one ever made directly to the Government, was submitted in response to the published advertisement.

Appellants' case is predicated entirely upon the hypothesis that the condition in their bid that the goods should be "firsts" was agreed to by the Government in the following letter (hereinafter, for convenience, called the award), which was sent them by the Materials Disposal and Salvage Division after the various bids had been opened and considered (Finding VI, R. 9–10):

> WAR DEPARTMENT, AIR SERVICE,
> MATERIALS DISPOSAL & SALVAGE DIVISION,
> *New York District Office,*
> *February 10, 1920.*
>
> From: Air Service, Materials Disposal and Salvage Division, N. Y. District.
> To: E. I. McDowell, 20 Thomas St., N. Y. C.
> Subject: Sale No. 2545.
>
> 1. This is to advise you that Washington has awarded you 150,400 yards of 38"

grade "A" Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955, item 1—65,400 yards, and sheet No. 2879, item 6—85,000 yards.

2. Inasmuch as we have your check for $13,987.20 to cover 10% of the sale, it is requested that you send this office certified check for $125,884.80 to cover the balance due, together with your shipping directions.

3. This check should be drawn in favor of " Disbursing Officer, Air Service," marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award.

ROBERT COKER, *Capt., A. S. A.,*
District Manager M. D. & S. Division, by F. W. Weeks, Frank W. Weeks, Sales Manager.

" It does not appear that there was any acceptance of plaintiff's (appellants') bid otherwise than as embodied in the communication last above quoted." (Finding VI, R. 10.)

The court below has found that in the nomenclature of the linen trade " the term ' grade A' is a term of construction," whereas " the terms 'firsts' and 'seconds' are terms of quality," and that " the term ' grade A' was used in the trade, entirely separate and apart from the designation of quality

as indicated by the terms 'firsts' and 'seconds,' and if the construction of a fabric was such as to entitle it to the designation 'grade A' it was grade A, irrespective of quality." (Finding IX, R. 10.)

Deliveries of the linen were made to appellants at various times after the award, and payment therefor made at the bid price of 93 cents per yard. (Finding VII, R. 10.) No protest against the quality of the linen was made at the time of these deliveries. (R. 10.)

As the deliveries were short of the stipulated quantity, a proportionate repayment was made to appellants for the shortage, leaving the aggregate amount paid by them for the linen $134,144.60. (Finding VII, R. 10.)

About May, 1920, appellants resold thirty thousand yards of the linen for delivery in June, the linen to be bleached and delivered in that condition at $1.60 per yard. The purchaser, however, rejected the linen upon delivery on the ground that because of defects therein it was not first quality. By agreement, another thirty thousand yards selected from the entire lot was, after bleaching, substituted for the rejected material. The purchaser maintained that this lot was likewise not of first quality, *but the appellants contended that "it was in fact of that quality."* (Finding VIII, R. 10.)

Complaint was then made by the appellants to the Materials Disposal and Salvage Division, with the result that several detailed inspections of the

material were made by experts representing both parties. While the defects discovered were of a minor character, they were such as to warrant the conclusion that the linen as a whole was not of first quality. It did not appear, however, that it was not grade A. (Finding VIII, R. 10.)

(Whether the appellants inspected the linen before bidding, as the advertisement invited, the record does not disclose.)

" Seconds," the court has found, were worth in the linen trade approximately 25 per cent less than " firsts " at the time of the sale to appellants. " It does not appear from the record," however, " at what price or prices the plaintiff (appellants) sold this linen or what actual loss, if any, it sustained in connection with the purchase and sale thereof." (Finding X, R. 10, 11.)

The Court of Claims dismissed appellants' petition, holding that the Government in the award did not agree to the stipulation as to quality contained in appellants' bid, and that there was therefore a fatal variance between the bid and award which prevented the two from constituting a contract.

SUMMARY OF ARGUMENT

I. The published advertisement offered the goods for sale " as is," with inspection invited, and with " no guaranty." Appellants inserted in their bid the condition that the goods should be of first quality and " per sample submitted." There is nothing in the award indicating acquiescence in this condi-

tion by the Government. No doubt the appellants knew, as any reasonable person should have known, that when the award was made, the Government was ignoring the references in the bid to " sample submitted " and to " firsts " and intended to sell in accordance with the advertisement. As the bid and award were therefore not in accord with respect to the matter of warranting the quality of the goods, the award, under a well-settled principle of the law of contracts, constituted nothing more than a mere counter-offer by the Government, or a reiteration of its advertised offer, to sell without warranty. This counter-offer was accepted by appellants by completing payment of the bid price and taking full delivery of the goods.

II. The legal effect of the letter of award as a mere counter-offer was not affected by the fact that the Government acknowledged therein the receipt of a portion of the bid price and requested appellants to transmit the balance, together with shipping instructions. This counter-offer was accepted by appellants.

III. Collaboration by the United States with appellants in investigation of the latter's complaint as to the quality of the goods was not inconsistent with a sale without warranty of quality.

IV. Appellants admit that the opinions of the Acting Judge Advocate General and the Comptroller General upon which they so strongly rely have no binding force. Whatever persuasive effect

these opinions might have had is destroyed by the admission of these officers of lack of authority to entertain and adjudicate appellants' claim, and by patent differences between the facts upon which their opinions were based and those found by the Court of Claims.

ARGUMENT

I

THE UNITED STATES SOLD THE LINEN WITHOUT WARRANTY OF QUALITY

The question presented for decision is whether the United States in selling the surplus linen involved herein agreed to warrant the quality thereof. The linen, which was admittedly "left over from the war" (Appellants' brief, p. 2), was sold under authority of the Army Appropriation Act of July 11, 1919, c. 8, 41 Stat. 104, 105. That Act empowered the Secretary of War to sell surplus war supplies upon such terms as may be deemed best. (See *Erie Coal Co.* v. *United States,* 266 U. S. 518, 521.)

In *Merriam* v. *United States,* 107 U. S. 437, 441, 442, a case arising, like the present one, in the Court of Claims, this Court said:

> It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when

the contract was made. *Nash* v. *Towne,* 5 Wall. 689; *Barreda* v. *Silsbee,* 21 How. 146, 161; *Shore* v. *Wilson,* 9 Cl. & Fin. 355, 555; *McDonald* v. *Longbottom,* 1 El. & El. 977; *Munford* v. *Gething,* 29 L. J. C. P. 110; *Carr* v. *Montefiore,* 5 B. & S. 407; *Brawley* v. *United States,* 96 U. S. 168.

Let us consider then, briefly, the circumstances under which the Government sold its surplus war supplies. These circumstances were generally known to every one at the time, and the Court may take judicial notice of them. (*United States* v. *Hamburg-American Co.,* 239 U. S. 466; *Wallace* v. *United States,* 257 U. S. 541, 546; *Ransome Concrete Machinery Co.* v. *Moody,* 282 Fed. 29, 33, 35.)

It is a matter of common knowledge that the Government's need for supplies of almost every kind was so great during the War that in many instances it had to take what it could get and could not insist upon a rigid compliance with its peace-time specifications. Furthermore, supplies had to be purchased in such large quantities and in so short a period of time that it was usually impossible for the Government to subject materials to more than a cursory and casual inspection. In most instances the Government had to rely upon the good faith and integrity of the persons with whom it dealt. In this manner it accumulated during the War huge stocks of all kinds of materials, and after the Armistice there were stored in warehouses throughout the country surplus supplies which, it

has been estimated, cost about five billions of dollars. Due to the pressure under which these supplies were purchased, not only had there generally been no careful inspection of them to determine that they conformed to specifications, but there were even no accurate records of the quantities on hand or of their location.

When the Government began to sell its surplus property the Army had largely demobilized, and generally the officers charged with the duty of selling such property were not the same officers who had purchased it, and they rarely had personal knowledge of the character, condition, or quantity of the property which they offered for sale. Furthermore, it was then generally too late for the Government to assert claims for breach of warranty against the contractors who had supplied it, since the time within which such contractors were entitled to be notified of any breach of warranty had long passed. (Cf. *Reading Co.* v. *United States,* 268 U. S. 186.) In fact, it was often unknown from whom given supplies had been purchased. There was also doubt whether the officers selling surplus property had authority to warrant it (*Bennett* v. *United States,* 6 Ct. Cls. 103), even if they had been justified in doing so on the basis of the information they had with regard to it.

The Government was therefore forced to adopt, and did adopt, the policy of selling its surplus property without warranty. The adoption of a differ-

ent policy would have been reckless beyond measure and would have subjected the Government to numerous claims for breach of warranty when the Government itself could no longer assert such claims against its own vendors. The most that the agents of the Government could be expected to do, and all that they did attempt to do, was to give to purchasers in good faith whatever information they had with respect to the property offered for sale. In doing this, however, they uniformly accompanied the description of the property with some warning indicative of a purpose not to warrant. (See, for example, *Lipshitz & Cohen* v. *United States,* 269 U. S. 90; *Mottram* v. *United States,* decided by this Court April 12, 1926.) In other words, purchasers were to assume the risk that the property would meet expectations. Of course, by selling on such a basis the officers realized much less than they could have obtained for the supplies had the purchasers been given a warranty, but under the circumstances the policy adopted was the only safe one to pursue.

In line with such a policy the Government provided in the advertisement for bids in this case that the linen " would be sold ' as is ' at point of storage " (R. 8). Appellants admit that this provision contemplated a sale without warranty of quality. (Brief, p. 2.) Coupling it with the further provisions of the advertisement " that inspection is invited and that ' specifications and quanti-

ties on hand are based upon the best information available, but no guaranty on the part of the Government is given ' " (R. 8), it is obvious that the Government was offering the goods for sale without warranty of any kind.

In response to this advertisement appellants submitted a bid in which they inserted the condition that the goods should be "firsts." And they claim that this condition was agreed to by the Government in the award, which is set out in full at pages 4–5 hereof.

There is not a word in the award that can be construed as expressive of a purpose on the part of the Government to abandon its previously announced plan of selling the linen without warranty. As the Court of Claims pointed out (R. 12):

> In the communication of February 10 informing the plaintiff that it had been awarded a stated number of yards of grade A airplane linen we do not find the word "accepted" or any word of similar import used, or any reference to plaintiff's bid. This communication notified plaintiff of the award to it of a quantity of linen, which might or might not comply with the stipulation as to quality contained in plaintiff's bid, and cannot by any possibility be construed as an acceptance upon the condition attempted to be imposed that the goods were to be firsts.

The award was manifestly intended to be strictly in accord with the terms and conditions of sale set

out in the published advertisement. The bid and award were therefore plainly at variance on the question of warranting the quality of the goods, and the case falls squarely within the well-established principle of law stated in *Minneapolis & St. Louis Railway* v. *Columbus Rolling Mill,* 119 U. S. 149, 151, that "A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested." The award was nothing more than a mere counter-offer by the United States, a reiteration of its advertised offer, to sell the linen without warranty (See *Beaumont* v. *Prieto,* 249 U. S. 554, 556), and upon its receipt appellants, if they were not satisfied, should have taken steps to reject it. Instead of doing so, however, they accepted the counter-offer by completing payment of the bid price and taking full delivery of the goods. (R. 9–10.)

In view of the advertised offer, the terms of which were known to the appellants, in which the United States had declared that the linen would be sold without warranty, the form of the notice of award did not justify a belief by appellants that the United States had decided to completely reverse its declared policy to sell without warranty.

On the face of the advertisement, bid and award, it is, and then was, evident, to any reasonable per-

son, that in making the award the United States was ignoring the statement in the bid that the goods were to be " as per sample submitted " and to be " firsts," and intended to carry out the advertised sale. If, as contended by appellants, the award was an acceptance of the bid as made, it was a sale " as per sample submitted " as well as of firsts, and yet this theory will not work because no sample was ever submitted by any authorized agent of the Government; and if the award is thus treated as ignoring the reference in the bid to a sample, there is no reason to claim the reference to " firsts " was not ignored also.

It is evident there was no meeting of the minds on a sale with a warranty of quality. The minds of the parties first met when the appellants acquiesced in an award made without reference to quality, and evidently intended to be based on the advertisement, and sent in a check for the balance.

It is significant also that no protest as to the quality of the linen was made at the time the various deliveries thereof were being made. It was not until June, 1920, or later, three months or more after all the linen had been delivered (Findings IV, VI, VII, VIII, R. 8, 10), that any question as to the quality of the linen arose, and it arose then only after a purchaser to whom the appellants had resold a part of the goods, after bleaching, asserted that the goods were not of first quality, although the appellants stoutly maintained that they were of

that quality. Appellants then complained to the Government that the goods were not "firsts." (Finding VIII, R. 10.) This was the first intimation the Government had that appellants intended to claim that the Government had agreed to sell them linen of any particular quality and looks like an afterthought suggested by the objection raised by appellants' vendee.

At the end of appellants' brief (pp. 23–24) we find a vague suggestion that the Government agreed not only to warrant the quality of the linen, but that it agreed to give a warranty in connection with every term appellants used in their bid to describe the material. As the Court of Claims in its findings attempted to do no more than give fragmentary extracts from the advertisement, it is impossible to tell whether the descriptive terms to which appellants allude were not also employed in the advertisement. If they were, the bid in this respect would obviously stand on the same plane as the advertisement, which expressly provided that " specifications . . . are based upon the best information available, but no guaranty on the part of the Government is given." (R. 8.) In other words, the bid would be an offer to buy without warranty that the goods met the descriptive terms. If, however, the appellants used terms in describing the linen that were not used in the advertisement, the same argument we have made in connection with the condition as to quality they inserted in their bid would apply here.

II

THE LETTER OF AWARD WAS NONE THE LESS A MERE COUNTER-OFFER BECAUSE THE GOVERNMENT ACKNOWLEDGED RECEIPT THEREIN OF A PORTION OF THE BID PRICE AND REQUESTED APPELLANTS TO TRANSMIT THE BALANCE, TOGETHER WITH SHIPPING DIRECTIONS

In the award there appears the following sentence (R. 9):

> (2) Inasmuch as we have your check for $13,987.20 to cover 10% of the sale, it is requested that you send this office certified check for $125,884.80 to cover the balance due, together with your shipping directions.

Appellants insist that this language is inconsistent with any other intent on the part of the Government than to accept their bid, including, of course, its stipulation as to quality. (Brief 10, 11.)

We have seen, however, that the bid and award were not in accord in a material respect, and therefore that the latter, under a well-settled principle of the law of contracts, constituted nothing more than a mere counter-offer on the part of the United States. Considered in this light and not as something isolated and detached from the rest of the transaction, there is nothing incongruous in the insertion of the above language in the award. By it the Government's officers say nothing more to the appellants than that " we have received a sum of money transmitted by you on the assumption that your bid would be accepted without modification;

we have not seen fit, however, to assent to the condition as to quality inserted by you in such bid; if you should nevertheless desire to go ahead with the transaction you should send the balance of the price stipulated in your bid, which is agreeable to us, together with your shipping directions."

Appellants seem to feel that if the United States did not intend to accept their bid unconditionally, they should have offered in the award to return the initial deposit of $13,987.20. (Brief, p. 10.) There was, however, no logical reason why the Government should not have retained the money until appellants indicated whether they desired to accept or reject the proposal advanced by the Government. That this course was justified is evidenced by the fact that the appellants did accept the Government's offer by transmitting the balance of the bid price and taking complete delivery of the goods. (Finding VII, R. 10.)

III

PARTICIPATION BY THE GOVERNMENT IN THE INVESTIGATION OF THE MERITS OF APPELLANTS' COMPLAINT AS TO THE QUALITY OF THE LINEN WAS NOT INCONSISTENT WITH A SALE WITHOUT WARRANTY

Appellants lay stress upon the following finding of the Court of Claims (Finding VIII, R. 10):

> * * * complaint was made by the plaintiff to the Material Disposal and Salvage Division, as a result of which there were several detailed inspections of the materials by experts representing both parties.

They say (Brief, p. 13):

> If the goods were sold without obligation or warranty respecting quality, it is difficult to see the purpose of the War Department in arranging, with the Appellants, these inspections by experts representing both the Government and the Appellants. Certainly where the vendee claimed a breach of warranty as to quality, the vendor could not be reasonably expected to participate in an expert determination of the question whether there had been a breach without disclaiming any responsibility as to quality, if in fact no such responsibility had been assumed.

Far from showing, as appellants have stated, that the inspections were " arranged " by the War Department, the record specifically states that these inspections resulted from the complaint which had been submitted by appellants. The appellants and not the War Department were the prime movers. As a practical matter, however, the officers of the War Department would have been chargeable with delinquency if, in the face of possible legal action against the Government, they had failed to participate with appellants in an investigation into the merits of their complaint, regardless of whether the goods were sold with a warranty of quality or not. Such an investigation might have disclosed that the goods were of the quality which the appellants themselves had theretofore insisted to a third party they were (Finding VIII, R. 10), and thus either have frus-

trated a suit upon the alleged warranty or, at least, have furnished the Government with a complete defense to such an action.

There is no basis in the record for appellants' assertion that the officers of the War Department participated in these investigations "without disclaiming * * * responsibility as to quality," if that be material. The findings are entirely silent upon the matter, and the reason is evident from the following quotation from the trial court's opinion (R. 11):

> There is much in the record as to the various inspections which were made of the goods after being complained of by the plaintiff as to their quality, and the conclusion from such inspections, which we have not found it necessary to incorporate in the findings, since the merits of the case, as we see it, are to be determined upon another basis.

The Court of Claims acted rightly in refusing to enter extensive findings in connection with these investigations. The Government did not contract to deliver goods of any specific quality, and it was therefore immaterial what the subsequent investigations disclosed as to their quality, or whether the Government collaborated with appellants in these investigations with or without an express reservation or disclaimer of responsibility as to quality. The legal effect of the nonacceptance of appellants' bid and its disputed condition can not

be subverted by an act which at most is construable solely as a prudential step undertaken for the protection of the Government's interests.

IV

THE OPINIONS OF THE ACTING JUDGE ADVOCATE GENERAL AND THE COMPTROLLER GENERAL ARE WITHOUT PERSUASIVE VALUE IN THE CONSIDERATION OF THIS CASE

To their petition in the Court of Claims appellants annexed two opinions rendered in connection with their claim by the Comptroller General and the Acting Judge Advocate General of the Army. (R. 3–7). In both opinions these officers express the view that the Government unconditionally accepted appellants' bid and thereby contracted to deliver first quality linen. While appellants now admit that these opinions were not "binding in the slightest degree on the Court of Claims" (Brief, p. 14), and by the same token have no greater weight in this Court, they have nevertheless made repeated references to them in the brief they have filed here.

These opinions were rightly ignored by the Court of Claims in deciding this case. In the first place, both officers admit their lack of authority over the claim here involved. Thus the Acting Judge Advocate General says in his opinion to the "Director of Sales," which was first in point of time (R. 7):

> Such a claim for damages is, of course, unliquidated in amount and therefore the

> administrative officers of the War Department are without authority to entertain or adjust it.

And the Comptroller General in his opinion says (R. 4):

> However, the claim is clearly one for damages resulting from a breach by the Government of the sale contract and there is no appropriation available for the payment of such claims. Therefore, the claim can not be adjudicated by and paid on the certificate of the General Accounting Office, under any appropriation.

It is obvious, therefore, that these officers should have said nothing with reference to the legal effect of the letter of award. All they should have said, under the circumstances, was that they were without power to entertain and adjudicate the claim.

Moreover, there are various patent differences between the facts upon which these officers relied, as recited in their opinions, and those found by the Court of Claims, which facts, of course, are the ones upon which this case must be decided.

To give several illustrations: In the Comptroller General's opinion we read (R. 4):

> It appears that after a *representative of the Air Service* had called on claimant and exhibited a sample of aeroplane linen to be sold by the Government, claimant submitted an offer of 93 cents per yard for approximately 168,400 yards of linen, giving cer-

tain specifications and further stipulating "goods to be firsts."

* * * * *

It is admitted by the Air Service that the advertisement did not come to claimant's notice until after its bid had been submitted and accepted. (Italics ours.)

This is simply another way of saying that the bid involved in this case resulted not from the published advertisement, but from the display of samples made by the alleged Air Service representative.

In the Acting Judge Advocate General's opinion we read (R. 5):

> In January, 1920, *a sales agent of the Government* called upon the firm of William Iselin & Company, exhibited a sample of linen and offered same for sale. This firm *thereupon* through one E. I. McDowell, submitted a bid in the following language: (Here follows the bid involved in this controversy; *supra,* p. 3.) (Italics ours.)

The Acting Judge Advocate General would also seem, therefore, to have been of the view that appellants' bid came into being as the result of the activities of the alleged governmental sales agent.

Here, however, is what the Court of Claims found:

> In January, 1920, two different parties *claiming* to be authorized representatives of the United States in that behalf exhibited samples and solicited bids from the plain-

tiff for the purchasing by it of said linen, and on January 19, 1920, the plaintiff, by E. I. McDowell, acting in that behalf, submitted to Harry Stultz, one of said parties, a bid, to him addressed, for said linen, referring to it as "approximately 168,400 yards," the aggregate of the two items mentioned in the advertisement hereinafter referred to, at 0.85 per yard "linen to be as per sample herewith."

Said Stultz was not an authorized representative of the United States with authority to sell said linen, but was operating in his own behalf, and no proceeding was had under said bid, so far as appears from the record. On February 2, 1920, said Stultz submitted to the material disposal and salvage division of the Air Service a bid for identic quantities of said linen in two items as in said advertisement set out, at a price of $0.87½ per yard. (Finding III, R. 8.)

It does not appear that the representative of the plaintiff acting in its behalf had seen the advertisement referred to at or before the time that the bid was submitted to said Stultz, *but said advertisement came to his attention very shortly thereafter and before February 2, 1920, under which date the said representative of the plaintiff, namely, E. I. McDowell, acting for and on behalf of the plaintiff, submitted to the Materials Disposal and Salvage Division of the Air Service the following bid:* (The bid involved herein is then set forth.) (Finding V, R. 8, 9.)

From these findings, it is evident that no authorized agent of the Government ever exhibited samples of the linen to appellants; that the present sale was not in any sense a sale by sample; and that the published advertisement, and that alone, was what gave birth to the only bid which appellants ever made for the linen directly to the Government. That bid is the one appellants are relying on in this case.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

W. MARVIN SMITH,
Attorney.

APRIL, 1926.

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